United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

~~75-7699~~ 75-7646

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

76-7011

B P/S

GEORGE RIOS, et al.,

Plaintiffs-Appellees,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,

Defendants-Appellants.

- -

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A.

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RESTATEMENT AND INTRODUCTION

The issue in this case is whether the court below erred in awarding attorneys' fees to the National Employment Law Project, attorneys for the Rios plaintiffs-appellees (hereinafter referred to as the "Project" or the "Rios attorneys") in this Title VII litigation. The statutory authority for such an award is found in Section 706(k) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(k), which states, in relevant part, that:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee...." 42 U.S.C. §2000e-5(k) (emphasis added).

It is uncontroverted that at the time of this litigation the Project operated under contract and grant from the United States Office of Economic Opportunity ("O.E.O.") and the United States Equal Employment Opportunity Commission (E.E.O.C.), and that these two federal agencies provided the Project with between 92 and 97 percent of their funding. See Brief for Appellant Local 638, Docket No. 75-7699, at 8-9; Appendix at 760*; A-1002; A-1004; A-1021.

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*Hereinafter, references to the Appendix will be in the form of "A-____."

Defendant-appellant Enterprise Association Steam-Fitters Local 638 (hereinafter referred to as "Local 638" or the "Union") primarily argues that the applicable statutory language precludes an award of attorneys' fees to the Project. Additionally, the Union maintains that notwithstanding the statutory prohibition, the purpose of an award of attorneys' fees, i.e., to make it easier for persons of limited means to bring a meritorious suit, is not served by an award of such fees to a publicly funded organization, since such an organization does not charge a fee to its clients.

The Rios attorneys, in a lengthy restatement of facts well known to this Court by virtue of prior appeals in this litigation (Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (1974) (affirming order imposing affirmative relief and remanding for recalculation of goal) and Rios v. Enterprise Association Steamfitters Local 638, 520 F.2d 352 (1975) (denying intervention by whites)) and in other briefs presently before this Court, continue to stress the historical context of this litigation while ignoring the two to three year period of the Union's complete compliance with the complex Affirmative Action Plan, A-1121-1122; A-1206, the Union's limited financial resources, and the disastrous economic situation in the steamfitting construction industry.

In addition, the Rios appellees continue to ignore the fact that by the very wording of the district court's order, A-1033, the award of attorneys' fees is to go directly to the Project and not to its "clients."

This reply brief will address several of the arguments made in the Project's brief.

ARGUMENT

POINT I

NO COURT HAS RULED UPON THE PROPRIETY OF AN AWARD OF ATTORNEYS' FEES PURSUANT TO SECTION 706 (k) OF THE CIVIL RIGHTS ACT TO A FEDERALLY FUNDED LEGAL SERVICE ORGANIZATION NOR IS HIS THIS COURT BOUND BY ANY DECISIONS REGARDING THE AWARD OF FEES TO LEGAL SERVICE ORGANIZATIONS.

A. This Court Has Not Ruled Upon The Propriety Of An Award Of Attorneys' Fees To A Legal Service Organization, Nor Has It Ruled Upon the Propriety of Such An Award To An Organization Funded by E.E.O.C. and O.E.O. in a Title VII Context.

Contrary to the Rios attorneys' contention at pages 31-32 of their brief, this Court has not ruled upon the availability of attorneys' fees to an organization that does not accept fees from clients, nor has this Court ruled

upon the availability of fees under 42 U.S.C. §2000e-5(k) to an organization that is almost entirely funded by the E.E.O.C. and O.E.O. The case of Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974) involved a non-statutory award of fees in a suit challenging a state unemployment compensation statute. Although this Court stated that it was "unimpressed" with appellant's contention that an award of fees to a non-profit corporation was improper, 4 F.2d at 649, this statement was clearly dictum. Indeed, there was no discussion of the source of funding of the organization. Most important is the fact that there was no statutory prohibition against an award to the E.E.O.C. or the United States. The Jordan case is clearly inapposite to the Union's position in this appeal.

The case of Class v. Norton, 376 F.Supp. 496 (D. Conn.), aff'd in part and rev'd in part, 505 F.2d 123 (2d Cir. 1974) is similarly irrelevant to the Union's argument. The issue presented to this Court in Class was whether a non-statutory award of attorneys' fees against the defendant in his official capacity was warranted. This Court ruled that the Eleventh Amendment did not bar the non-statutory award of fees against the defendant in his official capacity since such an award would have only an "ancillary effect" upon the state treasury, 505 F.2d at 126, and that the award of fees against the defendant in his individual capacity was

barred by the "qualified immunity traditionally accorded executive officers." 505 F.2d at 127 (citations omitted).

In addition, these two cases were decided prior to the Supreme Court decision in Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975), and they both involved non-statutory awards of counsel fees. They are clearly inapposite to the instant case.

Thus, despite the authority cited in the Rios attorneys' brief, there is no Second Circuit authority on the issue raised by the Union in a Title VII context. We have cited none and they have cited none.

The recent decision of this Court in Fort v. White, _____ F.2d _____, slip. op. 1789 (February 9, 1976) removes the underpinnings from much of the appellees' argument. In White, this Court was presented with the question of whether the statutory fee award under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3612(c), required fees to be awarded unless "special circumstances" rendered such an award unjust. Although an award of fees was suggested by this Court in White, this Court rejected such a standard for Title VIII cases generally because the purpose of fee awards, enabling litigation, could be served by awards of compensatory damages from which plaintiffs could pay their lawyers. Here, an award of fees is also unnecessary to

enable litigation because the plaintiffs do not have to pay fees to their lawyers and their lawyers' income is in no way dependent on fees.

Even were this Court to accept the "special circumstances" standard, the following circumstances of this case render an award of fees unjust: the fact that the Project is a publicly funded legal service organization and does not charge a fee to its clients; the duplication of effort by the Rios Attorneys and the U.S. Attorneys' Office; and the Union's severely limited financial resources. See Brief for Union at 10, 12-16, 17, 19.

B. None Of The Cases Cited By Appellees Have Ruled On The Issues Raised Herein.

The Rios attorneys have cited no cases supporting their contention that an award of counsel fees to an organization that is almost entirely funded by the federal government (E.E.O.C. and O.E.O.) is allowed under 42 U.S.C. §2000e-5(k).

The cases of Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974), Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974), Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974), Townsend v. Edelman, 518 F.2d 116 (7th Cir. 1975) and Palmer v. Columbia Gas of Ohio,

Inc., 375 F.Supp. 634 (N.D. Ohio 1974), all involved awards of attorneys' fees on a non-statutory basis and are therefore irrelevant. Moreover, the reasoning of these cases in awarding fees to legal service organizations is in no way compelling. Indeed, the rationale expressed by the court in Palmer, supra, i.e., that such organizations are forced to rely upon the "political vagaries" of the political decision-making process, is particularly appropriate for discussion in the instant case, for the same "political vagaries" apply to all Congressional funding of federal agencies, including the E.E.O.C. Thus, if this Court were to grant fees to the Project, it would indirectly be enlarging the Congressional budgetary allotment to the E.E.O.C., since Congress obviously considered the E.E.O.C.'s overall budget, including contracts with organizations like the Project, when it established appropriations for the E.E.O.C. What Congress has expressly refused to allow (under 42 U.S.C. §2000e-5(k)) and implicitly refused to allow (through budgetary allocations) this Court should not allow. Likewise, O.E.O. funds were Congressionally regulated and this Court should not indirectly replace Congressional assessment as to the amount and use thereof.

The Rios appellees have also cited cases awarding attorneys' fees pursuant to statutory authority under Title II of the Civil Rights Act, 42 U.S.C. §2000a-3(b) (Miller v.

Amusement Enterprises, 426 F.2d 534 (5th Cir. 1970); Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141 (4th Cir. 1975)), Title VIII of the Act, 42 U.S.C. §3612(c) (Hairston v. R & R Apartments, 510 F.2d 1090 (7th Cir. 1975)), the Emergency School Aid Act, 20 U.S.C. §1617 (Thompson v. Madison County Board of Education, 496 F.2d 682 (5th Cir. 1974)) and the Truth-in-Lending Act, 15 U.S.C. §1640(a)(2) (Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975); Jones v. Seldon's Furniture Warehouse, Inc., 357 F.Supp. 886 (E.D. Va. 1973)). Brief for Rios Appellees at 27, 31-37. Yet none of the above cases expressly deal with the question of whether a federally funded legal service organization is precluded by statute from receiving an award of attorneys' fees. Thus, the Truth-in-Lending Act does not preclude fee awards to the United States, 15 U.S.C. §1640(a)(2), and none of the cases cited under Titles II and VIII of the Civil Rights Act, nor any cited under the Emergency School Aid Act, considered the Union's distinct argument that the Project is statutorily precluded from receiving an award of counsel fees.

Finally, appellees do cite to this Court several Title VII cases where awards of attorneys' fees have been made to various organizations. Brief for Rios Appellees at 33-34. Again, none of these cases purport to deal with the

statutory issue raised herein. For example, in Davis v. County of Los Angeles, ____ F.Supp. ____, 8 EPD ¶9444 (C.D. Cal. 1974), the award of fees was made to a privately funded, non-public organization. Similarly, in Rosenfeld v. Southern Pacific Co., 519 F.2d 527 (9th Cir. 1975), it appears that counsel was a private attorney. Moreover, in Clark v. American Marine Corp., 320 F.Supp. 709 (E.D. La. 1970), aff'd per curiam 437 F.2d 959 (5th Cir. 1971), the recipient was the NAACP Legal Defense and Educational Fund, Inc. Finally, no discussion of the statutory question exists in the cases of Doe v. Osteopathic Hospital of Wichita, Inc., 333 F.Supp. 1357 (D Kan. 1971), Lea v. Cone Mills, 438 F.2d 86 (4th Cir. 1971), Davis v. City of Los Angeles, supra, Rosenfeld v. Southern Pacific Co., supra, and Clark v. American Marine Corp., supra.

This Court is therefore presented with a clean slate upon which to write. No decisions of this Court on the general issue of awarding attorneys' fees to legal service organizations have been noted by any party to this appeal, and no decisions of any Court have been noted on the issue of whether 42 U.S.C. §2000e-5(k) precludes such an award to the Project. For the reasons set forth in the Union's prior brief to this Court, we respectfully urge this Court to deny attorneys' fees to the Project.

POINT II

THE RIOS APPELLEES' OTHER ARGUMENTS ARE WITHOUT MERIT.

A. The Rios Appellees' Attempt To Distinguish Authority Cited By The Union Has Failed.

The Rios appellees' attempt to distinguish the holding in Gaddis v. Wyman, 336 F.Supp. 1225 (S.D.N.Y. 1972) on the ground that the fee award sought therein was upon a non-statutory basis, whereas in the instant case the statute purportedly requires fee awards in all but "very unusual circumstances." Brief for Rios Appellees at 33. It is surprising that the Rios attorneys consistently utilize non-statutory award cases to support their arguments yet object to our reference to Gaddis. The fact is that the court in Gaddis v. Wyman, supra, justifiably denied fees to a legal service organization.

The Project's attempt to distinguish the case of Woolfolk v. Brown, 358 F.Supp. 524 (E.D. Va. 1973) is similarly devoid of merit. It is uncontestable that the court in Woolfolk denied fees to a publicly funded organization, rejecting the contention that such a denial may operate to deny services to other potential clients of the organization. While the court in Woolfolk did note that in certain circumstances policy considerations might favor

compensation to such organizations, the two policy reasons given by the court in Woolfolk are inapplicable herein. First, the Woolfolk court indicated that under some circumstances the cost of policy enforcement should be shifted to those who violate such policy. Not only was such an argument implicitly rejected by the Supreme Court in Alyeska Pipeline Co. v. The Wildnerness Society, supra, but in the instant case the cost of policy enforcement is being borne by the E.E.O. a its grants and contracts with the Project, and the E.E.O.C. is the very organization Congress has created to enforce civil rights policy. Second, the court in Woolfolk noted that a shift of the burden of attorneys' fees might be warranted in encouraging private litigation. However, as noted in the Union's main brief at 10, the aim of encouraging litigation would not be served by an award of fees here. Cf. White, supra. Again, nothing can change the fact that this very Project was denied an award of fees in Woolfolk.

Thus, despite much turning and twisting, the Rios attorneys can point to no case in which they were awarded attorneys' fees and, indeed, have failed to adequately distinguish the cases of Sims v. Sheet Metal Workers Local 65, 353 F.Supp. 22 (N.D. Ohio 1972), remanded, 489 F.2d 1023

(6th Cir. 1973), Dublino v. New York Department of Social Services, 348 F.Supp. 290, (W.D.N.Y. 1972), and Woolfolk, supra, in which they failed to receive such an award.

B. The Union Is Not Liable For The Acts Of The JAC.

In its brief to this Court on the issue of back pay (Docket No. 75-7646), the Union sets forth cogent reasons why it is not responsible for any liability that may be incurred by JAC. Brief for Defendant-Appellee Local 638, Docket No. 75-7646, at 54-56. Succinctly summarized, the Union submits that the Rios plaintiffs have failed to establish that the Union in any way controlled the operation of JAC and further submits that the members of the board of the Steamfitters Industry Educational Fund (the parent body of the JAC) are trustees and not agents of the Union. Id. It thus follows that the Union is not responsible for any attorneys' fees liability that may be assessed against JAC.

C. The Union Members Are Not Liable For Attorneys' Fees.

Citing no authority and with little discussion, the Rios attorneys imply that the individual members of the Union deserve to bear part of the cost of attorneys' fees. Brief for Rios Appellees at 27. Assuming, arguendo, that

the Rios attorneys are entitled to any fees at all, appellees' implicit argument flies squarely in the face of the district court's ruling that:

> "There was no proof at trial that the members of Local 638 individually engaged in discriminatory practices against members of the plaintiff class...." 400 F.Supp. at 996; A-1016 (emphasis added).

D. Assuming, Arguendo, That This Court Compels An Award Of Attorneys' Fees, The Rios Attorneys Are Not Entitled To The Full Amount They Sought.

1. The District Court Had Wide Latitude In Assessing An Award Of Attorneys' Fees. Its Decision Can Only Be Overturned If It Constituted An Abuse Of Discretion.

The standard by which the reasonableness of the award is to be judged is the familiar one of "abuse of discretion". E.g., Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1974); Weeks v. Southern Bell Tel. & Tel. Co., 467 F.2d 95 (5th Cir. 1972); 6 Moore's Federal Practice, ¶54.77.

In the instant case the district court clearly enunciated its reasons for not awarding the entire fee sought by the Rios attorneys. 400 F.Supp. at 996-997; A-1016-1018. And notwithstanding the Rios attorneys' contention to the contrary, the ability of the Union to pay is a highly

relevant consideration. See Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. 1974); cf. Thornton v. East Texas Motor Freight, 497 F.2d 416, 421-422 (6th Cir. 1974); United States v. Georgia Power, 474 F.2d 906, 919-922 (5th Cir. 1973); Laffey v. Northeast Airlines, Inc., 374 F.Supp. 1382, 1390 (D.D.C. 1974). Certainly, it cannot be said that the district court abused its discretion in this case.

2. Assuming, Arguendo, That This Court Determines That An Award Of Attorneys' Fees Is Required, And Assuming Further That This Court Determines That The Amount Granted By The District Court Was Insufficient, A Remand Is Required For An Evidentiary Hearing.

Should this Court determine that an award of fees to the Project is required and that the district court abused its discretion in awarding the amount of fees it did, we respectfully request that this Court should remand the case to the district court for a full evidentiary hearing. City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974). Although the court below stated that the "affidavits submitted [by the Rios attorneys] are sufficiently detailed to meet the standards of the Court of Appeals in [Grinnell]," 400 F.Supp. at 996; A-1016, we respectfully submit that since no evidentiary hearing was held, a remand is required under Grinnell.

CONCLUSION

For the reasons set forth above and in the Union's main brief, we respectfully urge this Court to reverse the district court's ruling and to deny an award of attorneys' fees to the Project.

Respectfully submitted,

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Enterprise Association,
Steamfitters Local 638 of U.A.

Richard Brook,
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE RIOS, et al., Plaintiffs-Appellees, -against- ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 of U.A., et al., Defendants-Appellants.	AFFIDAVIT OF SERVICE Dockets Nos. 75-7699 76-7011
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellee, -against- ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U.A., et al.,	

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

HENRY C. MAIMIN, being duly sworn, deposes and says:

1. Deponent is not a party to the action, is over 18 years of age and resides at 1175 York Avenue, New York, New York.

2. On April 16, 1976 deponent served two copies of the within Reply Brief of Defendant-Appellant Enterprise Association Steamfitters Local 638 of U.A. upon:

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the addresses designated by said attorneys for that purpose by depositing two copies of same in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Henry C. Maimin

Sworn to before me this
16th day of April, 1976

Notary Public

RICHARD BROCK
NOTARY PUBLIC, State of New York
No. 30-02BR5463750
Qualified in Nassau County
Commission Expires March 30, 1978

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Dated,

Yours, etc.,

DELSON & GORDON

Attorneys for

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To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at

Dated,

Yours, etc.,

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To

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Index No. 76-7011 Year 19 76

UNITED STATES COURT OF APPEALS
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ENTERPRISE ASSOCIATION STEAM-FITTERS LOCAL 638, et al.,

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is hereby admitted.

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.....

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